UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

CHRISTOPHER SELLS, and others,

Defendants.

Case No. 11-cv-04941 CW (NC)

ORDER COMPELLING RESPONSES TO INTERROGATORIES 8-10

Re: Dkt. No. 88

Defendant Timothy Murawski and the SEC filed a joint discovery letter brief in which Murawski requests an order compelling the SEC to respond to interrogatories 8-10. The SEC argues that the interrogatories seek protected work product. The question presented is whether the SEC must disclose facts provided by three immunized witnesses to the extent the SEC's allegations are premised on information provided by those witnesses. Dkt. No. 88, Joint Letter Brief, Jan. 29, 2013. Because the Court finds Murawski has shown the information sought by the interrogatories is unavailable by other means and substantially necessary to his case, the Court GRANTS his request for an order compelling responses to interrogatories 8-10.

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The witnesses, Sonia Stahl, Traci Louis,[1] and Dan Griffin, were interviewed by the SEC in 2010. Murawski asserts that these interviews were not recorded by a stenographer. Interrogatories 8-10 ask the SEC to disclose the dates of its communications with the witnesses and to describe the information provided by the witnesses, including information provided during three specific meetings in 2010. Dkt. No. 90-1 at 5-6. The SEC, objecting under the attorney work product doctrine, asserts that the Supreme Court's seminal decision, *Hickman v. Taylor*, 329 U.S. 495 (1947), "specifically held this type of interrogatory was inappropriate." Letter at 4.

That is not the holding of *Hickman*. *Hickman* set forth a balancing test for the Court to apply where one party seeks discovery of information hidden in an attorney's files. "Where relevant and non-privileged facts remain hidden in an attorney's files and where production of those facts is essential to the preparation of one's case, discovery may properly be had." *Hickman*, 329 U.S. at 511. The burden rests on the party seeking discovery to establish "adequate reasons" to justify production. *Id.* at 512. The trial judge has discretion to determine whether discovery should be allowed. *Id.*; *see also* Fed. R. Civ. P. 26(b)(3)(A) ("Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial . . . ," but a court may order discovery of those materials where a party makes a showing of "substantial need" and unavailability by other means.).

In *Hickman*, the party seeking discovery had already made "the most searching inquiries" from the responding party, and the responding party had provided interrogatory responses that "would necessarily have included all pertinent information" gleaned through witness interviews. *Id.* at 508-09. Furthermore, the party seeking discovery had not demonstrated the necessity of the production, or the hardship or injustice caused by a denial of the discovery. *Id.* at 509.

This case presents a stark contrast to *Hickman*. Here, there is no evidence presented that the SEC has produced information that was gleaned through the 2010 witness

[1] The joint letter brief identifies the witness as Traci Davis, but interrogatory 9 refers to "Louis."

interviews of Stahl, Louis, and Griffin. To the contrary, the SEC has asserted every possible objection, including that the requests are "premature," are "inappropriate contention interrogatories," are "irrelevant," and seek information "protected by law enforcement and deliberative process privileges." Dkt. No. 90-2, SEC objections. These misplaced, boilerplate objections are overruled.

The Court finds that given the procedural and factual posture of this case, Murawski has presented more than "adequate reasons" to justify production, and the Court finds that injustice would be caused by a denial of the discovery. The content of these witnesses' statements in the 2010 interviews form the basis of the allegations against him, and the SEC has indicated that these witnesses may testify at trial. Letter at 5. There is no transcript or recording of these interviews from which Murawski could gather the facts attested to by these witnesses. The fact that Murawski might depose them now does not make available to him what they said to the SEC in 2010. And the SEC overlooks the fact that the substance of an immunized interview is itself highly relevant, as it might reveal inconsistencies in testimony or issues that bear on the witness's credibility. *See, e.g.*, *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1201-02 (C.D. Cal. 1999).

Sunshine is ordinarily the best medicine for a party that is keeping discoverable information hidden in the dark. But where, as here, one party is repeatedly withholding relevant information, stronger medicine may be required. *See* Dkt. No. 66, Order granting in part Murawski's motion to compel, Aug. 31, 2012.

Accordingly, Murawski's motion is GRANTED, and the SEC must respond to interrogatory requests 8-10 within fourteen days of this Order. If Murawski seeks sanctions in connection with this discovery dispute, his counsel must meet and confer with the SEC and then file a separate motion for sanctions within fourteen days of this Order. Any party may object to this non-dispositive Order within fourteen days. Fed. R. Civ. P. 72(a).

IT IS SO ORDERED.

Date: February 4, 2013

Nathanael M. Cousins
United States Magistrate Judge